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No. 03-895

In the Supreme Court of the United States

WALTER ROSALES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' claim to beneficial ownership of land that the United States claims to hold in trust as the reservation of the Jamul Indian Village, a federally recognized Indian Tribe, is barred because the Village is an indispensable party.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The opinion of the district court (App., *infra*, 1a-21a) is unreported.[1] The opinion of the district court denying petitioners' motion for reconsideration (Pet. App. 5a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2003. A petition for rehearing was denied on September 19, 2003 (Pet. App. 18a). The petition for a writ of certiorari was filed on December 18, 2003. The

[1] The district court's opinion, which was omitted from petitioners' appendix, is appended to this brief.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Walter Rosales, et al., claim that the grant of 4.66 acres of land (the Parcel) to the United States "in trust for such Jamul Indians as the Secretary may designate" constituted an "allotment" of the land to them, so that the land is owned by them as individual Jamul Indians rather than by the Jamul Indian Village (Village), a federally recognized Tribe. The district court granted summary judgment for the United States because, *inter alia*, the Village, rather than petitioners, is the beneficial owner of the Parcel. App., *infra*, 19a-20a. The court of appeals affirmed on the ground that the Village is an indispensable party under Federal Rule of Civil Procedure 19. Pet. App. 1a-4a.

1. a. In 1887, Congress enacted the Indian General Allotment Act (also known as the Dawes Act), ch. 119, 24 Stat. 388 (25 U.S.C. 331 *et seq.*), which empowered the President to allot tribal lands to individual Indians. Under the General Allotment Act, a parcel was allotted and to be held in trust for 25 years, after which time a fee patent would issue to the Indian allottee, who could then sell it to non-Indians. 25 U.S.C. 348; see generally *United States* v. *Mitchell*, 445 U.S. 535, 543-544 (1980).

The General Allotment Act and subsequent amendments provided for allotments from several sources. Section 1 authorized the President to make allotments to individual Indians from Indian reservation lands. 25 U.S.C. 331 (1994), repealed by Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, Tit. I, § 106(a)(1), 114 Stat. 2007. Section 4 permitted Indians not residing on a reservation to settle on "any surveyed or unsurveyed lands of the United States not

otherwise appropriated"—in other words, public domain land—and to have the land allotted to them in the same manner as reservation land could be allotted. 25 U.S.C. 334. Subsequent amendments authorized the Secretary of the Interior to make allotments within national forests to certain Indians occupying such land. 25 U.S.C. 337.

The process of patenting an allotment to an Indian occurred in two steps. Upon approving an allotment, the Secretary issued a trust patent, declaring that the United States held the allotted land in trust for 25 years for the sole use and benefit of the Indian to whom the allotment was made, or his successors. 25 U.S.C. 348. At the expiration of the trust period, the Secretary conveyed a fee patent for the allotment to the Indian owner. 25 U.S.C. 348.

b. In 1934, Congress repudiated the practice of allotment with the enactment of the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*). See *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 650 n.1 (2001); *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The IRA halted further allotments of Indian reservation lands and extended indefinitely the period during which allotments would be held in trust by the United States. See 25 U.S.C. 461, 462; *County of Yakima*, 502 U.S. at 255.

The IRA also authorized the Secretary of the Interior, at his or her discretion, to acquire interests in land, including by gift, "for the purpose of providing land for Indians." § 5, 25 U.S.C. 465. Such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." § 5, 25 U.S.C. 465. The Secretary of the Interior is authorized to proclaim new Indian reservations

on lands acquired under this provision. § 7, 25 U.S.C. 467.

In addition, Section 16 of the IRA allowed certain Indians living on the same reservation to organize and form a Tribe. 48 Stat. 987, codified as amended at 25 U.S.C. 476. Section 19 of the Act defines the term "tribe" to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. 479. "Indian" is defined to include, *inter alia*, "persons of one-half or more Indian blood." 25 U.S.C. 479.

2. a. The Jamul Indian Village is a small Indian Tribe located in Jamul, California, east of San Diego. Prior to the events at issue in this case, the Jamul Indians resided on private property owned by Lawrence and Donald Daley. The property was adjacent to an Indian graveyard encompassing 2.21 acres, which was owned by the Roman Catholic Bishop of Monterey and Los Angeles. C.A. E.R. 12.

b. During the 1970s, representatives of the Jamul Indian Village contacted the Bureau of Indian Affairs (BIA), an agency of the Department of the Interior, about obtaining federal recognition as an Indian Tribe. C.A. E.R. 284. BIA explained that the Village could seek recognition as a half-blood Indian community, living on the same reservation, pursuant to Sections 16 and 19 of the Indian Reorganization Act, 25 U.S.C. 476 and 479. C.A. E.R. 284-285. The Village decided to pursue that option and, on March 15, 1978, BIA notified the Jamul Indians that it had received a sufficient number of signatures of half-blood Jamul Indians "to proceed with the proposed acquisition through a donation to establish the Jamul Indian Reservation." App., *infra*, 20a; C.A. E.R. 128. On December 12, 1978, the Secretary of the Interior acquired, by gift from the

Daleys, the 4.66 acres on which the Jamul Indians resided. The grant deed conveyed the Parcel to

> [t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate.

App., *infra*, 19a.

c. On May 9, 1981, the half-blood members of the Jamul Indian Village ratified a constitution, which formally established the Jamul Indian Village, governed by a tribal council. C.A. E.R. 410-419; see also *Rosales* v. *Sacramento Area Director, Bureau of Indian Affairs*, 32 I.B.I.A. 158, 160 (1998). Among other things, the constitution provided for tribal jurisdiction over all lands within the Village and granted the tribal council power to prevent the sale, disposition, lease or encumbrance of tribal lands and to administer tribal assets. C.A. E.R. 410, 414. The constitution was approved by the Department of the Interior on July 7, 1981. *Id.* at 420; *Rosales*, 32 I.B.I.A. at 159 ("Village was organized in 1981 under the Indian Reorganization Act."). On November 24, 1982, the Secretary of the Interior included the Jamul Indian Village on the list of federally recognized Tribes published in the *Federal Register*. 47 Fed. Reg. 53,132 (1982).[2] Petitioners do

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[2] During the 1990s, disputes arose about tribal membership and leadership in the Jamul Indian Village. Walter Rosales and Karen Toggery brought several administrative appeals to the Interior Board of Indian Appeals (IBIA) raising such issues. See *Rosales* v. *Pacific Reg'l Director, Bureau of Indian Affairs*, 39 I.B.I.A. 12 (2003); *County of San Diego* v. *Pacific Reg'l Director, Bureau of Indian Affairs*, 37 I.B.I.A. 233 (2002); *Rosales* v. *Sacramento Area Director, Bureau of Indian Affairs*, 34 I.B.I.A. 125 (1999); *Rosales* v. *Sacramento Area Director, Bureau of Indian Affairs*, 34

not dispute that the Jamul Indian Village is a federally recognized Tribe. Pet. 5.

d. On February 5, 2001, BIA provided notice that the Jamul Indian Village had applied to have the United States acquire approximately 101 acres of property in trust for the Village. App., *infra*, 2a; C.A. E.R. 83-97; see also 67 Fed. Reg. 15,582 (2002). The accompanying application detailed the need for the land for purposes of housing, economic development, and other community needs. C.A. E.R. 87-88. The application explained that the Tribe planned to construct a casino/resort development on its existing property, and that the fifteen existing home sites on the Reservation would need to be moved to the newly acquired land. *Id.* at 88.

3. On May 30, 2001, petitioners filed a complaint for declaratory and injunctive relief against the United States and various federal agencies. The complaint alleged that upon the United States' acquisition of the Parcel, petitioners became entitled to it as an allotment under the IRA and the General Allotment Act of 1887.

I.B.I.A. 50 (1999); *Rosales* v. *Sacramento Area Director, Bureau of Indian Affairs*, 32 I.B.I.A. 158 (1998). Petitioners have sought district court review of some of those rulings in *Rosales* v. *United States*, No. 1:03CV01117 (D.D.C. filed May 23, 2003). Other federal court challenges to tribal leadership and gaming plans brought by Rosales or other Jamul Indians represented by Rosales' counsel in this case include *Jamul Indian Village* v. *Hunter*, No. 3:95CV00131 (S.D. Cal. voluntarily dismissed Sept. 30, 1996); *Rosales v. Townsend*, No. 3:97CV00769 (S.D. Cal. voluntarily dismissed Nov. 11, 1998); *Rosales* v. *United States*, No. 1:98-CV-00860-DGS (Fed. Cl. stayed Apr. 19, 2000); *Rosales* v. *Kean Argovitz Resorts, Inc.*, No. 3:00CV01910 (S.D. Cal. dismissed Apr. 18, 2001), aff'd, 35 Fed. Appx. 562 (9th Cir. 2002) (unpublished), cert. denied, 123 S. Ct. 437 (2002). All of those cases have been either stayed or voluntarily dismissed.

App., *infra*, 1a-2a. The complaint alleged that the United States' February 5, 2001, publication of the notice proposing to take additional land into trust for the Village, in order to allow a casino to be built on the Parcel, illegally denied and excluded petitioners from their claimed allotment. C.A. E.R. 14, 15. Petitioners sought an order: (1) declaring that they became entitled to an allotment of the Parcel at the time the deed to the United States was recorded in 1978; (2) compelling the United States to issue them trust patents for the Parcel; (3) enjoining the United States from denying or excluding them from the Parcel; (4) declaring the United States liable for money damages for depriving them of use and benefit of the Parcel; and (5) awarding attorney's fees and costs. App., *infra*, 2a.

4. On February 14, 2002, the district court granted the United States' motion for summary judgment. The district court first determined that petitioners' claim to fee ownership of the Parcel was not ripe because, under the General Allotment Act, the United States could convey land to an individual Indian in fee only after first holding the land in trust for 25 years. Because the Parcel was not taken into trust until 1978, petitioners would not be able to obtain a fee patent until at least 2003. In any event, the district court concluded that the General Allotment Act was limited by the IRA, which extended indefinitely the 25-year trust period, thus precluding petitioners from obtaining a fee patent for the Parcel. App., *infra*, 15a-17a.

In the alternative, the district court held that, even if the General Allotment Act was not modified by the IRA, its provisions did not apply to the Parcel, because the Parcel was accepted into trust pursuant to 25 U.S.C. 465, and was not allotted pursuant to the General Allotment Act, 25 U.S.C. 331 *et seq.* The district

court concluded that Section 465 made no provision for the issuance of a fee patent for trust land to Indians. App., *infra*, 17a-19a. Finally, the district court held that the language of the 1978 deed clearly conveyed the Parcel in trust to the United States for the benefit of the Jamul Indian Village as a whole, not for specific individual Indians. *Id.* at 19a-20a.

The district court denied petitioners' motion for reconsideration, concluding that the Parcel is held in trust for the Village, not petitioners as individuals; that petitioners' claim to be a dependent Indian community (apparently distinct from the federally recognized Village) was without merit; and that the fact that the Village was not formally recognized as a Tribe by the United States until after the Parcel was donated was immaterial because the Secretary may take land into trust for a Tribe before it is formally organized. Pet. App. 11a-15a.

5. In an unpublished decision, the court of appeals affirmed the district court's judgment on different grounds, holding that the Village is an indispensable party to the action under Rule 19 of the Federal Rules of Civil Procedure. The court of appeals first concluded that the Village is a necessary party because the Village claimed jurisdiction over the Parcel and its interests would be impaired if petitioners were declared to be the beneficial owners. Pet. App. 2a-3a. The court determined that the United States is not an adequate representative of the Village's interests in the action because, under Ninth Circuit precedent, the United States could not adequately represent one Tribe against another in an intertribal dispute. *Id.* at 3a.[3] The

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[3] Although the dispute here is between a Tribe and individual Indians rather than between two Tribes, the court of appeals ap-

court of appeals then concluded that the Village could not be joined because it enjoys sovereign immunity from suit, and that the Village is an indispensable party because (i) relief could not be shaped to avoid prejudice to the Village's interest in the Parcel, and (ii) the Village's interest in maintaining its sovereign immunity outweighs petitioners' interest in litigating their claims. *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals does not warrant review by this Court.

Petitioners seek review on the question whether a federally recognized Indian Tribe is a necessary and indispensable party to an action by an individual Indian seeking an allotment pursuant to 25 U.S.C. 345. Pet. i. The presentation of that question rests on an incorrect premise, for petitioners' action does not properly arise under 25 U.S.C. 345. This is, rather, a suit challenging the nature of the United States' title to the Parcel, because petitioners contend that the United States is erroneously holding the Parcel in trust for the Jamul Indian Village. Such a suit is governed by the Quiet Title Act (QTA), 28 U.S.C. 2409a, but is barred by the QTA's exception for Indian trust lands. Even putting that threshold jurisdictional obstacle to one side, however, the court of appeals' decision does not conflict with the decision of any other court of appeals or present any issue of general importance warranting further review.

1. As an initial matter, review is not warranted to consider the rule of law petitioners now advocate be-

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parently concluded that it poses the same type of potential conflict in that the Tribe and petitioners each claim that the United States holds the Parcel in trust for them.

cause petitioners failed to raise that issue in the courts below. In the court of appeals, petitioners did not dispute that a Tribe *could* be an indispensable party to an action brought under 25 U.S.C. 345, but only that, under the facts of this case, the Jamul Village *is not* an indispensable party. Specifically, petitioners did not argue below, as they do now (Pet. 12), that the court of appeals should have followed *Antoine* v. *United States*, 637 F.2d 1177, 1181 (8th Cir. 1981), which concluded that "determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States." Nor did they argue, as they do in their petition (Pet. 17-18), that the court could avoid implicating the Village's interests in the Parcel by awarding petitioners damages rather than the Parcel itself. Rather, petitioners argued only that the Village did not have or claim a legally protected interest in the Parcel, that the United States could adequately represent the Village's interests, and that there was no other forum in which petitioners could bring their claim. See Appellants' Reply Brief 26-30. Where an issue is neither raised before nor considered by the court of appeals, this Court ordinarily will not consider it. *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. Moreover, the question whether there can be an indispensable party in an action against the United States to enforce an asserted right to an allotment under 25 U.S.C. 345 is not properly presented in this case because petitioners' assertion that this suit arises under 25 U.S.C. 345 is without merit. Section 345 authorizes suits claiming the right "to an allotment of land under any law or treaty." It waives the United

States' sovereign immunity only for "suits seeking the issuance of an allotment." *United States* v. *Mottaz*, 476 U.S. 834, 845 (1986); see also *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 142 (1972) ("Section 345 authorizes, and provides governmental consent for, only actions for allotment.").

The Parcel is not an "allotment" subject to 25 U.S.C. 345. "Allotment is a term of art" that pertains to "a selection of specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens*, 406 U.S. at 142. Specifically, the General Allotment Act provided for allotments to be made from three types of land: Indian reservations (25 U.S.C. 331, repealed by 25 U.S.C. 461); public domain land (25 U.S.C. 334); and national forests (25 U.S.C. 337). Here, petitioners do not claim a right to an allotment out of reservation, public domain, or national forest land. Rather, they claim that the donation of *private land* to the United States in trust for such Jamul Indians as the Secretary may designate constituted an allotment of the Parcel to them, and that the Secretary therefore was required to issue trust patents to them. Pet. 6. Further, petitioners do not cite any "law or treaty" that provides for their asserted right to allotment of the Parcel, a necessary predicate for an action against the United States under 25 U.S.C. 345. Petitioners' claim amounts to nothing more than a claim that the terms of the deed conveying the Parcel to the United States granted them individual rights to beneficial ownership of the Parcel, a claim that is not covered by Section 345.

Nor do petitioners make a claim "for" an original allotment, which is the only type of claim for which Section 345 waives the United States' sovereign immunity. See *Mottaz*, 476 U.S. at 846. Rather, petitioners claim (Pet. 9) that the United States wrongfully deprived

them of land that they assert has *already* been allotted to them (apparently by operation of law), when it was conveyed to the United States in 1978. Specifically, petitioners claim that the United States wrongfully excluded them from their purported allotments in February 2001 when it published notice of the proposal to take additional land into trust for the Village. In *Mottaz*, however, this Court ruled that 25 U.S.C. 345 does not waive the United States' immunity to suit for the same sort of claim, in which an Indian plaintiff alleged that the United States illegally sold to a third party land that previously had been allotted to her. 476 U.S. at 847-848.

Indeed, petitioners' claim amounts to nothing more than a quiet title action, which is barred by the Indian trust lands exception to the Quiet Title Act, 28 U.S.C 2409a. See *Mottaz*, 476 U.S. at 847-848 (party cannot avoid limitations in QTA by invoking 25 U.S.C. 345 to bring quiet title action against the government). The QTA waives the United States' sovereign immunity for civil actions "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). The QTA provides the "exclusive means by which adverse claimants may challenge the United States' title to real property." *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983). The QTA, however, expressly "does not apply to trust or restricted Indian lands," 28 U.S.C. 2409a(a), and thus bars suits against the United States in which the plaintiff claims title to lands held in trust for Indians. *Mottaz*, 476 U.S. at 842. By virtue of that exception, if the United States claims an interest in real property based on its status as trust lands, the QTA does not waive the government's sovereign immunity. *Id.* at 843. Here, the United States claims to hold the Parcel in trust for the Jamul Indian

Village. It follows, under *Mottaz*, that petitioners' claim to title in that land is barred by the QTA.[4] This threshold jurisdictional obstacle to petitioners' suit renders the indispensable party issue irrelevant, and renders this an unsuitable vehicle for considering the indispensable party issue.

3. Quite aside from the jurisdictional bar, this case does not warrant review. The court of appeals' decision does not conflict with decisions of other courts of appeals. Contrary to petitioners' assertion, the court of appeals did not hold that an Indian Tribe is always an indispensable party under Rule 19 in an allotment action brought pursuant to 25 U.S.C. 345. Indeed, the court of appeals did not even cite 25 U.S.C. 345, or suggest that petitioners' suit properly arises under that provision. Rather, the court of appeals simply held that, under the specific facts of this case, the Village is an indispensable party. Pet. App. 2a-3a. The cases that petitioners claim conflict with this holding are factually and legally distinguishable.

First, the court of appeals' decision does not conflict with *Antoine* v. *United States*, 637 F.2d 1177 (8th Cir. 1981). *Antoine* involved the claim of an individual Sioux Indian to a true "allotment" of land from the Sioux Indian Reservation pursuant to a treaty and the Sioux Allotment Act. *Id.* at 1178-1179. The United States had allotted the land in question to another Indian, and the land had subsequently passed into the possession of private parties. *Id.* at 1181; see also *Antoine* v. *United*

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[4] The United States argued in the court of appeals that petitioners' claim was not a claim for an allotment but rather was a quiet title action barred by the Indian trust lands exception to the QTA. See Appellee's Br. 18-30. The court of appeals, however, did not address that threshold question.

States, 710 F.2d 477, 478-479 (8th Cir. 1983). The court of appeals rejected the United States' contention that the person or persons currently in possession of the tract were indispensable parties, because it viewed the United States, "as the allotting agent," to be the "appropriate defendant," and concluded that the absence of the parties in possession of the claimed allotment did not "preclude[] *all relief* in this case." *Antoine*, 637 F.2d at 1181 (emphasis added). Although the court recognized that it could not order a return of the allotted land unless the persons currently in possession were allowed to join as parties, it determined that the government could nevertheless be held liable for damages in their absence. *Id.* at 1181-1182. The court viewed the plaintiff's complaint as seeking "to recover possession *or* damages" for the government's failure to issue a patent. *Id.* at 1178.[5]

In the instant case, petitioners claim ownership not of an allotment from public land or a common holding, as claimed by plaintiff in *Antoine*, but of formerly *private* land granted by private parties to the United States to be held in trust for unspecified Jamul Indians to be designated by the Secretary. The United States therefore is not an "allotting agent," as it was in *Antoine*, but rather the grantee of the legal title of the land. Petitioners have not sought damages as an alternative to

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[5] The opinion's description of the relief sought in the complaint does not appear to support the court's conclusion that the plaintiff had requested damages as an alternative to the land itself, although the plaintiff had sought as alternative relief the grant of another tract of equal size. *Antoine*, 637 F.2d at 1181. On remand, the plaintiff did specifically request damages as an alternative to a declaration of title to the land itself. *Antoine* v. *United States*, 537 F. Supp. 1163, 1167 (D.S.D. 1982), aff'd in part and vacated in part, 710 F.2d 477 (8th Cir. 1983).

recovering possession of the Parcel, and they continue in this Court to "seek a declaration of their rights to their allotment" and to enjoin the United States from "denying, and otherwise excluding the Petitioners from, their allotment in, and designation as trust beneficiaries of," the Parcel. Pet. 10. Thus, the circumstances that led the *Antoine* court to conclude that the persons in possession of the property at issue in that case were not indispensable parties are absent in this case. Moreover, under *Mottaz*, 476 U.S. at 845-846 & n.9, there is a serious question whether Section 345 waives the United States' sovereign immunity and creates a cause of action in the circumstances of a case like *Antoine*, and Section 345 does not in any event contain the necessary unambiguous waiver of sovereign immunity to a suit for money damages.

The court of appeals' decision also does not conflict with *Citizen Band Potawatomi Indian Tribe of Oklahoma* v. *Collier*, 17 F.3d 1292 (10th Cir. 1994). In *Potawatomi*, the court of appeals held that the Absentee-Shawnee Tribe was not an indispensable party to a suit in which the Potawatomi Tribe sought a declaration that allotments could be made from its reservation to individual Absentee-Shawnee Indians only with the Potawatomi Tribe's consent. *Id.* at 1293-1294. The court's holding rested on its determination that the prospect that individual Absentee-Shawnee Indians might seek an allotment from the reservation gave the Absentee-Shawnee *Tribe* no claim to a present interest in the reservation land. *Ibid.* Rather, the court concluded that the Absentee-Shawnee Tribe had "merely an expectation" that the United States would consider allotment applications from its members. *Id.* at 1294. In this case, by contrast, the court of appeals expressly found that "[t]he Village has claimed jurisdiction over

the parcel of land at issue in this action since at least 1981" (Pet. App. 2a), and therefore claims a present interest in the Parcel.

4. In the end, the court of appeals' decision simply represents an application of Rule 19 to the particular facts of this case. As this Court has recognized, the question "[w]hether a [party] is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that [party], can only be determined in the context of particular litigation." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 118 (1968). In this case, the court of appeals concluded that the Village is a "necessary" party under Rule 19(a)(2)(i) because the Village claims an interest in the Parcel. Pet. App. 2a-3a. Because the Village enjoys sovereign immunity from suit and therefore could not be joined as a defendant, *Kiowa Tribe of Oklahoma* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998), the court of appeals then considered whether the Village is an "indispensable" party under Rule 19(b). Pet. App. 3a. The court of appeals applied the four factors noted in Rule 19(b) and concluded that the possible prejudice to the Village counseled in favor of dismissal of the action. *Ibid.* That fact-specific determination does not warrant this Court's review and presents no occasion for the Court to consider broader issues of when an Indian Tribe should be regarded as an indispensable party in a suit against the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2004

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 01-951-IEG(JAH)
[Doc. No. 17]

WALTER ROSALES, MARIE TOGGERY,
AND KAREN TOGGERY, PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Feb. 14, 2002

ORDER (1) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND (2) DENYING DEFENDANTS' MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS

Presently before the Court is defendants United States, Department of the Interior, Bureau of Indian Affairs, and National Indian Gaming Commission's (collectively referred to as "defendants") motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h) or, in the alternative, for judgment on the pleadings under Rule 12(c) or summary judgment under Rule 56. For the reasons discussed below, the Court grants defendants' motion for summary judgment.

BACKGROUND

On May 30, 2001, plaintiffs Walter Rosales, Marie Toggery, and Karen Toggery ("plaintiffs") filed a complaint for declaratory and injunctive relief pursuant to the Indian Reorganization Act of 1934. In their complaint, plaintiffs seek (1) a declaration of plaintiffs' entitlement to the allotment of parcel number 597-080-01; (2) to compel defendants to issue to plaintiffs a trust patent for the above-mentioned parcel; (3) to enjoin defendants from further denying plaintiffs' entitlement to the parcel; (4) money damages for deprivation of the use and benefit of their parcel; and (5) reasonable attorneys' fees, costs, and expenses. In their complaint, plaintiffs allege that "on February 5, 2001, the United States took action, and first published notice, denying plaintiffs' entitlement and excluding them from their allotment of land in parcel 597-080-01." (Compl. at 6 ¶ 18.) This notice, attached to defendants' motion as Exhibit A, was issued by the Bureau of Indian Land Affairs pursuant to 25 C.F.R. §§ 151.10 and 151.11 and invited the public to comment on the pending application by the Jamul Indian Village Reservation for the United States to take certain parcels into trust for the benefit of the Reservation. The pending application does not include the parcel to which plaintiffs claim allotment rights, but plaintiffs allege that the publication of the notice apprised them of the government's failure to issue a patent to plaintiffs for an allotment to parcel 597-080-01. The leadership of the Jamul Reservation has been pursuing the trust application in an effort to commence gaming activities on tribal land. However, plaintiffs contend that they do not challenge the pending application for trust status of the potential gaming property but rather the government's

failure to issue a patent to plaintiffs for an allotment on a separate piece of land, parcel 597-080-01.

On August 10, 2001, defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 4(i), 8(a), 12(b)(2), and 12(b)(6), for failure to comply with minimum federal pleading requirements, lack of personal jurisdiction, insufficient service of process, and failure to state a claim upon which relief may be granted. In their motion to dismiss, defendants also contended that the Doe defendants named by plaintiffs in their complaint are improper and should be dismissed. Plaintiffs filed an opposition to the motion on October 1, 2001. Defendants filed their reply on October 15, 2001. In their reply, defendants withdrew the portion of their motion to dismiss based on lack of personal jurisdiction and insufficient service of process under Rules 4(i), 12(b)(2), and 12(b)(5), in light of the additional information regarding service of the summons and complaint that plaintiffs attached to their opposition to defendants' motion. On October 16, 2001, the Court denied defendants' motion.

On November 9, 2001, defendants filed the instant motion to dismiss or, in the alternative, for judgment on the pleadings or summary judgment. In their motion, defendants contend that they are entitled to dismissal, judgment on the pleadings, or summary judgment on the basis that (1) the case is not ripe for adjudication; (2) plaintiffs lack standing; and (3) plaintiffs have not exhausted their administrative remedies. Defendants further contend in their motion that plaintiffs cannot claim allotment rights to parcel number 597-080-01 because such ownership was abolished in 1934. Finally, defendants argue in their motion that defendant National Indian Gaming Commission ("NIGC") is also

entitled to dismissal, judgment on the pleadings or summary judgment because it does not play a role in determining whether land should be acquired by the United States in trust. In their opposition, plaintiffs contend that defendants mischaracterized the nature of their claims. Plaintiffs emphasize that they are not challenging the application for trust status currently pending before the Bureau of Indian Affairs. Rather, plaintiffs contend that the gravamen of their complaint is that the government failed to issue them a patent for an allotment to parcel number 597-080-01, which was conveyed to the United States in trust in 1978. In support of plaintiffs' claim to this allotment, plaintiffs attach to their complaint the 1978 deed by which parcel number 597-080-01 was conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." (*See* Compl., Ex. B.)

Responding to plaintiffs' recharacterization of their claim, defendants contend in their reply that plaintiffs' argument that they are entitled to a patent for their allotment to parcel number 597-080-01 lacks merit because Congress abolished the allotment form of ownership in 1934. Here, the United States took parcel number 597-080-01 into trust pursuant to 25 U.S.C. § 465. (*See* Compl., Ex. B.) Defendants emphasize that, unlike land that was allotted prior to 1934 under the General Allotment Act, land held in trust pursuant to § 465 does not become allotted land but rather land owned by the United States for the benefit of tribes. Defendants also contend that no other allotment statute applies to the facts of this case. Thus, plaintiffs are not entitled to the issuance of a patent for parcel number 597-080-01 because the land was taken into trust by the

United States for the benefit of the Jamul Tribe, rather than for the individual plaintiffs.

DISCUSSION

I. Legal Standards

A. Motion to Dismiss under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows for dismissal where there is a "lack of jurisdiction over the subject matter." *See* Fed. R. Civ. P. 12(b)(1). In ruling on defendant's motion, the Court is guided by well-established principles:

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion "can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in doing so rely on affidavits or any other evidence property before the court." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Thus, the existence of disputed material facts will not preclude the court from evaluating for itself the merits of jurisdictional claims. *Id.* Because the plaintiff bears the burden of establishing subject matter jurisdiction, no presumption of truthfulness attaches to the allegations of the plaintiff's com-

plaint, and the Court must presume that it lacks jurisdiction until the plaintiff establishes jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Whether a claim is ripe for adjudication is an issue of subject matter jurisdiction under the case or controversy clause of Article III of the federal Constitution. *St. Clair*, 880 F.2d at 201. As any other challenge to a Court's jurisdiction over the subject matter of a case, motions raising ripeness as an issue are properly brought under Rule 12(b)(1). *Id.* Once a party raises this issue, "[i]t then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Id.* In deciding whether the case is ripe, the Court may look to this "extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes." *Id.* Similarly, issues of standing go to the Court's jurisdiction over the subject matter of the case and are properly raised in a motion to dismiss under Rule 12(b)(1). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

Pursuant to Rule 12(h), the Court must dismiss the action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." Fed. R. Civ. P. 12(h). Thus, although defendants previously filed a motion to dismiss based upon Rules 8(a) and 12(b)(6) and subsequently filed an answer to the complaint on November 1, 2001, the instant motion is nonetheless properly before the Court. Furthermore, because lack of subject matter jurisdiction is a matter in abatement, the Court may not rule on a summary judgment motion "or any other mat-

ter going to the merits" where the Court determines that it lacks jurisdiction over the subject matter. *Capitol Indus.-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 (9th Cir. 1982).

B. Motion for Judgment on the Pleadings pursuant to Rule 12(c)

Federal Rule of Civil Procedure 12(c) allows a motion for judgment on the pleadings to be filed "after the pleadings are closed." Fed. R. Civ. P. 12(c). The motion may be brought by either party "when all material allegations of fact are admitted in the pleadings and only questions of law remain." Wright & Miller, 5A *Federal Practice and Procedure* § 1367, at 510-511; *see also Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984) (quoting an earlier version of Wright & Miller for the proposition that a 12(c) motion should only be granted where "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law."); *accord Vashistha v. Allstate Ins. Co.*, 989 F. Supp. 1029, 1031 (C.D. Cal. 1997). In ruling on a Rule 12(c) motion, the courts must accept all well-pleaded factual allegations as true and determine whether the moving party is entitled to judgment under those facts. *See General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Cong. Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Doleman*, 727 F.2d at 1482.

If "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed. R. Civ. P. 12(c); *see also Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990) ("[J]udgment on the pleadings is improper when the district court goes beyond the pleadings to resolve an issue; such a proceeding must properly be treated as a motion for summary judgment.") (internal citations omitted).

C. Summary Judgment pursuant to Rule 56

Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material issue of fact is present when a factual determination must be made by a jury to determine the rights of the parties under the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). A dispute is only "genuine" when "the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson*, 477 U.S. at 255. In deciding a motion for summary judgment, the Court must examine all the evidence in a light most favorable to the non-moving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material facts exists. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 325. If the moving party does not bear the burden of

proof at trial, he may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of genuine issue of material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.), *cert. denied*, 493 U.S. 809 (1989). Instead, "the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied." *Lujan*, 497 U.S. at 885 (quoting *Celotex*, 477 U.S. at 323).

Once the moving party meets the requirement of Rule 56 by either showing that no genuine issue of material fact remains or that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. To make such a showing, the non-moving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 325. Such evidence need

not be in a form admissible at trial to avoid summary judgment. *Id.* The moving party is entitled to judgment as a matter of law if the nonmovant fails to make a sufficient showing of an element of its case with respect to which it has the burden of proof. *Id.* Standing

II. Analysis

A. Motion to Dismiss under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

1. Ripeness

Defendants first contend that plaintiffs' claim should be dismissed for lack of subject matter jurisdiction because the notice published by the Bureau of Indian Affairs indicates that no action has been taken on the pending application for trust status referred to by the notice. Absent a final agency decision on the matter referred to by the notice, defendants contend, plaintiffs may not allege a claim arising from the defendants' publishing of a notice "denying plaintiffs' entitlement and excluding them from their allotment of land in parcel 597-080-01." In their opposition, plaintiffs clarify that their claim is not based on the pending application for trust status but rather on the government's failure to issue a patent to parcel 597-080-01 when it accepted the parcel into trust in 1978. The publishing of the notice, plaintiffs emphasize, does not form the gravamen of their complaint. Rather, it merely put them on notice that no patent had issued from the government's acceptance of the parcel into trust. In light of plaintiffs' clarification of the nature of their claim in their opposition, it is clear that dismissal based on the ripeness doctrine is inappropriate. Because plaintiffs are challenging the government's failure to issue a patent to parcel 597-080-01, rather than the pending application

by the Jamul Tribe for trust status for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00 (*see* Defs.' Ex. A), ripeness is not a basis upon which the Court may grant dismissal.

2. Standing

Defendants next contend that the Court lacks subject matter jurisdiction over plaintiffs' action because plaintiffs lack standing. Defendants' standing argument is similar to its ripeness argument in that defendants contend plaintiffs have not been injured because there has been no final agency decision on the proposed trust acquisition of parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00. Absent a final agency decision on the pending application, defendants contend, plaintiffs cannot show that they have suffered an injury in fact. Plaintiffs' opposition to this basis for dismissal parallels their opposition to defendants' ripeness argument. Plaintiffs emphasize that they are not challenging the pending application for trust status for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00. Rather, plaintiffs assert, the notice of the pending trust application posted on February 5, 2001 merely informed them that the Jamul Tribe planned to relocate plaintiffs' home sites onto the newly acquired trust land in order to construct gaming facilities on the site of plaintiffs' alleged allotment. (*See* Defs.' Ex. A at 3) (stating that the proposed construction of gaming facilities "will result in the relocation of our tribal headquarters and current home sites onto the proposed new trust lands").

Article III of the Constitution limits the jurisdiction of the federal courts to actual cases or controversies. U.S. Const. art III, § 2, cl. 1. In order to meet the requirement for a justiciable case or controversy, plain-

tiffs must have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). The "irreducible constitutional minimum" of standing requires that: (1) plaintiff has suffered an "injury in fact;" (2) the injury is "fairly traceable" to the challenged conduct of the defendant, and not the result of the independent action of some third party; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996) (citing *Lujan*, 504 U.S. at 560-61). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice to meet the plaintiffs' burden of proof as the party invoking federal jurisdiction. *See Lujan*, 504 U.S. at 561.

Given plaintiffs' recharacterization of their claim in their opposition, the Court finds that plaintiffs meet the three requirements for standing. Assuming plaintiffs' allegation that the United States holds land in trust for them individually to be true, plaintiffs have suffered an injury in fact by the government's failure to issue a patent to plaintiffs for parcel number 597-080-01. If the government indeed accepted parcel number 597-080-01 into trust for the benefit of the individual plaintiffs, interference with plaintiffs' use of the land may be fairly traceable to the government's alleged failure to generate the requisite patents to plaintiffs for the parcel. Finally, declaratory relief from the Court regarding plaintiffs' rights in the parcel may redress plaintiffs' injury in this case. To the extent that there exists a factual dispute regarding whether parcel number 597-080-01 was taken into trust for the benefit

of plaintiffs or for the Jamul Tribe, this issue may he resolved considering the evidence presented by defendants in support of their motion for summary judgment.

3. Failure to Exhaust Administrative Remedies

Finally, defendants argue that plaintiffs cannot pursue the instant action until they have exhausted their administrative remedies with respect to the proposed trust application for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00. As defendants note, the Jamul Tribe's application for the United States to take the above parcels into trust is still pending before the Secretary of the Interior. The February 5, 2001 notice referred to by plaintiffs in their complaint is merely one step in the process for trust applications with the Secretary of the Interior, defendants emphasize. Even after the Secretary issues a final decision regarding the trust status of the pertinent land, the decision can then be appealed to the Interior Board of Indian Appeals. (*See* Defs.' Mem. P. & A. at 9-10.) Only after the decision regarding trust status cannot be appealed to a superior authority in the Department of the Interior can the decision be considered a final decision subject to judicial review under the Administrative Procedure Act ("APA"). Defendants contend that because the Secretary of the Interior has not rendered a final decision regarding the application for trust status for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00, the Court may not adjudicate a challenge to the Secretary's decision at this time.

While defendants' analysis would be sound if plaintiffs' claim arose directly from the pending trust application, plaintiffs' opposition clarifies their position and establishes that their claim does not arise from the pending trust application but rather from the United

States' acceptance of parcel number 597-080-01 into trust in 1978. Consequently, plaintiffs' failure to wait for a final agency decision with respect to the application for trust status for parcels 597-060-04-00, 597-060-05-00, and 597-042-13-00 is not a basis upon which dismissal of the instant case is warranted. Because plaintiffs' claim does not arise from the pending application for trust status, defendants' argument based upon administrative exhaustion does not provide grounds for dismissal, judgment on the pleadings, or summary judgment.

B. Plaintiffs' Entitlement to Allotment

Defendants argue that even if the case were ripe and plaintiffs had standing and had exhausted their administrative remedies, dismissal, judgment on the pleadings, or summary judgment is appropriate because plaintiffs cannot claim allotment[1] rights in parcel number 597-080-01. Defendants contend that allotment as a form of ownership was abolished in 1934 and thus the conveyance of parcel number 597-080-01 in 1978 could not have vested plaintiffs with allotment rights entitling them to the issuance of a fee patent. In their opposition, plaintiffs argue that Section 461 of the Indian Reorganization Act of 1934 ended the United States' policy of granting allotments *of Indian land* to individual Indians, but the United States has continued to hold land in trust for both tribes and individual Indians subsequent to 1934. In particular, 25 U.S.C. § 465 contemplates that the United States may hold

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[1] As explained by the Supreme Court in *Affiliated Ute Citizens of Utah v. United States*, "Allotment is a term of art in Indian law. It means a selection of specific land awarded to an individual allotted from a common holding." 406 U.S. 128, 142-43 (1972).

land in trust for individual Indians. 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.") Plaintiffs contend that the 1978 deed of parcel number 597-080-01 indicates that the United States took this property into trust for them and, thus, they seek a declaration of their rights in the parcel and the issuance of a patent to the parcel.

In order to determine (1) whether plaintiffs are entitled to an allotment and (2) whether the land was accepted into trust for the benefit of the individual plaintiffs, it is necessary to distinguish among the various forms of ownership of Indian land contemplated by federal law as of the year in which the United States accepted parcel number 597-080-01 into trust. Prior to 1934, the United States pursued a policy by which communal Indian property was divided and granted to individual tribal members. *See Babbitt v. Youpee*, 519 U.S. 234, 237 (1997). As noted by the Supreme Court in *Babbitt*, such "allotted lands were held in trust by the United States or owned by the allottee subject to restrictions on alienation." *Id.* Under the General Allotment Act of 1887, the United States would hold the land in trust for twenty-five years and then convey the land to the Indian or his heirs in fee discharged of the trust. *See* 25 U.S.C. § 348; *Atkinson Trading Co., Inc. v. Shirley*, 121 S. Ct. 1825, 1830 n.1 (2001) (noting that the General Allotment Act, 25 U.S.C. § 331 et seq., "authorized the issuance of patents in fee to individual

Indian allottees who, after holding the patent for 25 years, could then transfer the land to non-Indians").

This policy failed, as Indian land ownership became increasingly fractionalized, and individual owners were unable to productively use their small interests. *See id.* at 238. Thus, "Congress ended further allotment in 1934," *id.*, and "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee patented) Indian lands," *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (citing 25 U.S.C. §§ 461, 462). The new Indian Reorganization Act of 1934 "reflected a new federal policy of halting the loss of Indian lands which had occurred under statutes that allotted tribal lands to individual Indians." *Chase v. McMasters*, 573 F.2d 1011, 1015 (8th Cir. 1978); *see also McAlpine v. United States*, 112 F.3d 1429, 1431 (10th Cir. 1997) (noting that "the IRA, among other things, prohibited any further transfer of Indian lands outside of the tribes and provided the Secretary authority to replace lands in lieu of those already allotted").

As shown by the above cases, plaintiffs' claim is, at best, a claim that is not yet ripe for adjudication. Even if the General Allotment Act remained unaffected by the Indian Reorganization Act of 1934, plaintiffs would have no right to a fee patent for at least 25 years after the land was taken into trust by the United States. Given that parcel number 597-080-01 was accepted into trust no earlier than 1978, (*see* Compl., Ex. B), plaintiffs would not be able to obtain a fee patent until at least 2003. Furthermore, as indicated by *Yakima*, when Congress passed the Indian Reorganization Act of 1934, it "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee patented)

Indian lands." *Yakima*, 502 U.S. at 255. Thus, even if plaintiffs had received an allotment under the General Allotment Act, the trust period was extended indefinitely by the IRA, and plaintiffs would have no right to compel issuance of a fee patent for the parcel. *See id.*

Furthermore, it is clear from the 1978 deed that the pertinent statute under which parcel number 597-080-01 was accepted into trust by the United States, 25 U.S.C. § 465,[2] does not provide for the issuance of fee patents to beneficiaries of the land. Although 25 U.S.C. § 348 contemplates a twenty-five year trust period after which a fee patent would be issued to the beneficiary of the trust, section 348 is a part of the General Allotment Act of 1887 and is limited in its application to "allotments provided for in *this* Act." *See* 25 U.S.C. § 348 (emphasis added). In contrast, section 465, which sets forth the conditions under which parcel number 597-080-01 was accepted into trust by the United States, does not contemplate a point at which the United States will cease holding the land in trust and issue a fee patent to the beneficiaries of the land. Rather, section 465 merely states,

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any in-

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[2] Significantly, 25 U.S.C. § 465 contemplates the United States taking land into trust for the benefit of tribes *or* individual Indians. *See* 25 U.S.C. § 465 (stating that "title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired . . ."); *see also Chase v. McMasters*, 573 F.2d 1011, 1015 (8th Cir. 1978) (rejecting party's contention that section 465 does not authorize the Secretary of the Interior to acceptance conveyance of title to land already owned in fee by an individual Indian for his benefit).

> terest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 465. Plaintiffs point to no section *within the 1934 Act* providing for the issuance of a fee patent to Indians for whose benefit the United States holds land in trust under § 465.[3] Nor is the Court aware of any such provision. To the contrary, section 465 "set[s] forth a procedure by which lands held by Indian tribes may become tax exempt." *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998). Under section 5 of the pre-1934 General Allotment Act, 25 U.S.C. § 348, land upon which a fee patent is issued not only becomes alienable and encumberable upon the issuance of the fee patent, but it also becomes subject to taxation. *See Yakima*, 502 U.S. at 263 and n.l. The issuance of a fee patent for land taken into trust under section 465 would directly contradict section 465's policy of providing tax exempt land for Indians and

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[3] It is unclear from plaintiffs' complaint and briefs whether they seek to compel the government to issue a fee patent or a trust patent. At one point in their complaint, plaintiffs state that they are seeking issuance of a trust patent. (*See* Compl. at 8, ¶ 2.) However, plaintiffs cite to 25 U.S.C. § 348, which provides for the issuance of a fee patent after the expiration of a twenty-five year trust period. (*See id.* at 4, ¶ 9.) Furthermore, plaintiffs cite in their briefs to case law pertaining to the issuance of fee patents. (*See* Pls.' Opp'n to Mot. Summary Judgment at 4.) Regardless of whether plaintiffs seek to compel the issuance of a fee or trust patent, it is clear that plaintiffs' claim fails on ether basis in light of the 1978 deed's language designating the Tribe, rather than the individual plaintiffs, as the beneficiaries of parcel number 597-080-01.

Indian tribes. *See Cass County*, 524 U.S. at 114-15. Thus, plaintiffs are not entitled to governmental issuance of a fee patent to parcel number 597-080-01, property taken into trust by the United States under section 465.

Finally, considering the evidence presented by defendants in their motion, plaintiffs cannot claim rights in parcel number 597-080-01 separately from those of the Jamul Tribe. First, considering the language of the 1978 deed, it is clear that parcel number 597-080-01 was not conveyed in trust to the United States solely for the benefit of the individual plaintiffs but rather for the Jamul Tribe as a whole. The 1978 deed conveys this parcel to "[t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." (Compl., Ex. B.) Simply because plaintiffs are by birth one-half degree or more Jamul Indian blood and have had continuous possession of the land does not result in the conclusion that they alone are entitled to control over the parcel. Rather, the language in the 1978 trust conveyance deed clearly refers to the Jamul Tribe, especially in light of the fact that the 1978 deed also references 25 U.S.C. § 479, which defines "Indian[s]" as "all persons of Indian descent who are members of any recognized Indian tribe." 25 U.S.C. § 479. Section 479a further provides that the Secretary of the Interior is vested with the authority to recognize Indian tribes. 25 U.S.C. § 479a(2). Thus, the 1978 deed's reference to "such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate" is a reference to the *tribe*, rather than to the individual half-blooded Jamul Indians then residing on the land.

In addition to the 1978 deed, the 1978 letter from the United States Department of the Interior, attached to defendants' reply as Exhibit L, also shows that parcel number 597-080-01 was taken into trust for the benefit of the Jamul Tribe, rather than for the individual plaintiffs. This letter notes that, as of March 15, 1978, the Department of the Interior "ha[d] received eleven signatures out of the thirteen ½ bloods for the Bureau of Indian Affairs to proceed with the proposed acquisition through a donation to establish the Jamul Indian Reservation." (Defs.' Ex. L.) Thus, plaintiffs cannot claim an individual right, allotment or otherwise, to parcel 597-080-01. Rather, the parcel is held by the United States in trust for the benefit of the Jamul Tribe.[4] *See* F. Cohen, *Handbook of Federal Indian Law*, at 472 (1982 ed.) ("The manner in which a tribe chooses to use its property can be controlled by individual tribe members only to the extent that the members participate in the governmental processes of the tribe."). Because there is no genuine issue of material fact with respect to plaintiffs' rights in parcel number 597-080-01 and defendants are entitled to judgment as a matter of law, summary judgment is appropriate in this case.[5]

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[4] To the extent that plaintiffs challenge the identity of the Jamul Tribe members and their leadership, this Court is not the proper forum for such a challenge. Rather, plaintiffs should continue to attempt to resolve their dispute regarding tribal leadership in the pending proceedings before the Interior Board of Indian Appeals. (*See* Pls.' Ex. D.)

[5] Because the Court finds that plaintiffs have raised no genuine issue of fact with respect to their entitlement to an allotment of parcel number 597-080-01, the Court does not address defendants' additional argument that the National Indian Gaming Commission is separately entitled to judgment on the pleadings. Even if plain-

CONCLUSION

Accordingly, for the reasons stated above, the Court **GRANTS** defendants' motion for summary judgment. The Court **DENIES** defendants' motion to dismiss, or in the alternative, for judgment on the pleadings.

IT IS SO ORDERED.

Dated: Feb. 13, 2002

/s/ IRMA E. GONZALEZ
IRMA E. GONZALEZ
United States District Judge

cc: Magistrate Judge Houston
all parties

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tiffs could establish allotment rights in parcel number 597-080-01, plaintiffs have not shown that their claim is ripe for judicial review given that the NIGC has not issued a final decision regarding the proposed gaming contract that is reviewable under Sections 701 through 706 of the Administrative Procedure Act.